SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1276

EDD PRUITT and MARJORIE ANN PRUITT,
Petitioners,

v.

HELENE CURTIS INDUSTRIES, INC.,
and COSMAIR, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners, Edd Pruitt and Marjorie Ann Pruitt, pray that a writ of certiorari issue to review the judgment and opinion entered by the United States Court of Appeals for the Fifth Circuit on October 27, 1967, in this proceeding.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated October 27, 1967, is reported at 385 F.2d 841. It appears in the Appendix hereto.

No opinion was rendered by the United States District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 27, 1967, and a timely petition for rehearing was denied on January 2, 1968. This petition for certiorari was filed within 90 days of that denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in formulating and applying a federal test of the sufficiency of the evidence to support a jury's verdict in a diversity case, a federal appellate court can test that sufficiency in terms of whether that court believes there is a "rational" basis in the record for the jury's verdict.

2. Whether a diversity litigant's right to the benefits of a jury trial under the Seventh Amendment is violated by the action of a federal appellate court reversing a jury verdict where the court substitutes its views for those of the jury as to what evidence, what inferences and what results are "rational."

3. Whether a federal appellate court is free, under the *Erie* doctrine, to ignore relevant state substantive law as to the standards for imposing strict liability on product manufacturers and to create and apply those principles of strict liability that accord with that court's own policies and beliefs.

4. Whether a violation of § 361 of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 361, is demonstrated by a jury finding that the conditions of use of an adulterated cosmetic, as prescribed in the labeling thereof, were followed, and whether such a violation constitutes negligence per se under applicable law without proof as to due care or foreseeability of harm.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Code, Title 28, § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions, in the courts of the United States, in cases where they apply.

United States Code, Title 21, § 361:

> A cosmetic shall be deemed to be adulterated—
>
> (a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual . . .

STATEMENT OF THE CASE

The petitioners, man and wife, brought this action in the United States District Court for the Northern District of Texas, premising jurisdiction on the diversity of the parties' citizenship. As amended, the petitioners' complaint sought the recovery of damages in the amount of $125,000, allegedly resulting from the purchase, mixture and application to the wife's hair of two products manufactured by the respondents herein: (1) "Helene Curtis New Blue Bleach," manufactured by the respondent Helene Curtis Industries, Inc.; and (2) "L' Oreal Creme Developer," manufactured by the respondent Cosmair, Inc.[1]

[1] Two other corporations, Nestle-Lemur Company and Clairol, Inc., were also named as defendants. But summary judgments were later entered in their favor, absolving them of any liability. R. 489.

The amended complaint asserted that the respondents had warranted that these two products were merchantable and reasonably suited for their intended use of dyeing and bleaching hair and that the petitioner wife had relied upon that warranty. But in fact, it was alleged, the products were "dangerous and poisonous and had ingredients in them that caused Plaintiff's injuries and damages." R. 493. And it was also claimed that the respondents had given "an inadequate warning concerning the test to be used before said products were applied to Plaintiff's head." R. 493. Violations of the Federal Food, Drug, and Cosmetic Act were alleged, it being claimed that the products were adulterated within the meaning of that Act and that the proper cautions were not given in the instructions as required by the Act. R. 494-495.

The petitioners' amended complaint further asserted that the use of these two products was the direct proximate cause of "a severe burn to her head, scalp, neck, ear, and the resulting loss of Plaintiff's hair in one portion of her scalp." R. 491. The fact that she suffered such injuries was never denied or disputed. The severe third-degree burns were permanent in nature, necessitating numerous skin grafts and total loss of her hair in the affected area. The top portion of her right ear was permanently deadened and withered. As a result, at the age of 22, the petitioner wife must wear a wig to cover her cosmetic damage, must suffer some permanent pain and suffering and has undergone a change in her personality and emotional make-up.

Trial was had before a jury, Judge Sarah T. Hughes presiding. The evidence at the trial concerning the circumstances of this tragic incident was undisputed and may be briefly summarized as follows:

The petitioner wife, a life-long resident of Ringgold, Texas, was a brunette who desired to be a blond. The first step in effectuating such a desire is to bleach one's hair. A friend, Mrs. Billie Hendren, volunteered to bleach the wife's hair. Mrs. Hendren had had experience in bleaching her own hair

and had used the products in question on her own hair on two occasions; while she had had no professional training as a beautician, she at one time had "lived across the hall . . . .from a girl that was going to beauty school. . .and I studied her books as much as she did and we studied together." R. 185.

In preparation for the bleaching operation, Mrs. Hendren went to a beauty shop in Terrell, Oklahoma, and purchased from a friendly beauty operator fresh supplies of the two products in question. She stated that "they were cheaper by getting them through the beauty shop than I could get them at a drugstore or any place else," R. 160, and that she was charged only the cost of the products to the beauty shop, R. 194. On the following day, Oct. 18, 1963, Mrs. Hendren mixed and applied the two products to the wife's hair in the kitchen of Mrs. Hendren's home in Terrell.

Both the wife and Mrs. Hendren testified that they had read and carefully followed the instructions accompanying the products. R. 29, 162-163. They noted on the box containing Helene Curtis New Blue Bleach the words "For Professional Use Only—Not for Public Sale," and on the bottle of L'Oreal Cream Developer the phrase "For Professional Use Only." They also noted the Helene Curtis instruction: "Do not mix Helene Curtis New Blue Bleach with anything except Helene Curtis Creme Developer (or a good grade of fresh 20 volume hydrogen peroxide.)" And on the L'Oreal Cream Developer bottle was seen the statement: "For tinting or bleaching use L'Oreal exactly as you would use twenty-volume peroxide with Imedia Petit, Imedia Petit Excellence, Imedia Creme, Super Blue Cream, or L'Oreal Lightener."

Acting pursuant to the instructions, Mrs. Hendren put on rubber gloves and performed the various bleaching processes. This was done after it was ascertained that the wife had not brushed or pre-shampooed or massaged her hair or scalp during the preceding 24 hours and after it was evident that her scalp had no cuts, eruptions or abrasions; the presence of any of these factors, according to the Helene Curtis

instructions, would have made it dangerous to proceed with the bleaching.[2]

Mrs. Hendren first mixed the proper amounts of the two products, it being the belief of both the wife and Mrs. Hendren that the L'Oreal Creme Developer fitted the Helene Curtis description of "a good grade of fresh 20 volume hydrogen peroxide" that could be mixed with Helene Curtis New Blue Bleach. R. 76, 163. The L'Oreal Creme Developer described itself as usable for bleaching purposes, "exactly as you would use 20-volume peroxide." R. 73.

The next step in the bleaching process, as performed by Mrs. Hendren pursuant to the instructions, was to make a so-called preliminary strand test of the wife's hair. This was done by taking a small strand of hair and applying the mixture "generously" to the entire length of the strand from scalp to outer tip. No ill effects were apparent from this test. And the test further determined the proper length of time to leave the mixture on the wife's hair in order to achieve the desired bleached color. R. 166.

After rinsing off the strand of hair used in the test, Mrs. Hendren proceeded to mix the remainder of the batch and to apply the mixture to all the hair from "about an inch out from the scalp to the end of the hair," starting on the back section of the right side of the head. R. 166. She then repeated the process by covering the inch out from the scalp. According to the instructions, the mixture was to be left on the hair "usually" for "about one and one-half hours of bleaching." Pls. Ex. 2. Mrs. Hendren, however, had

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[2]The Helene Curtis instructions also noted that "New Blue Bleach may nevertheless cause an allergic response in a susceptible person" and that "If scalp irritation is noted, stop using the product until it has been determined by proper patch test that the reaction is not due to an allergy." No such allergic response or scalp irritation occurred on the wife's head and hence no patch test was indicated or in fact given.

determined from the test that the wife's hair would bleach faster than thus indicated.[3]

At one point during the application of the mixture, Mrs. Hendren stopped to give herself and the wife glasses of previously prepared iced tea. R. 168. She then proceeded with the application on the last inch out from the scalp. But before the last section of the hair had been covered in this fashion, the wife complained that the right rear portion of her scalp was burning and stinging. Mrs. Hendren immediately took the wife to the sink, turned on the warm water faucet and washed out all the mixture from the entire head. R. 169. At that point she noticed a portion or spot in the right rear of the head "that was swollen out and her ear looked real puffed, the top of her ear, right here, and there was a portion of that hair that hadn't bleached." R. 169. The family doctor was called and appropriate medical attention thereafter ensued. The injury was diagnosed as a severe or third-degree chemical burn to the top of the right ear and to the head above and behind the right ear.

In the confusion surrounding the accident, Mrs. Hendren threw out the unused mixture and the other remnants of the two products. The ingredients of the mixture actually used were thus never available for testing or analysis.

The testimony of respondents' witnesses concerning the care taken in the manufacture and composition of the two products tended to show that, when each was used individually according to instructions, no harm would ensue to the user. But the precise composition of each product was labelled a trade secret and the chemical contents thereof were not made available during the trial. R. 265, 317, 321.

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[3]It was inevitable, of course, that portions of the mixture would occasionally touch the ears, neck or face. As this occurred, Mrs. Hendren followed the instructions by removing the mixture immediately from the touched area by using absorbent cotton soaked in water. R. 164.

At the conclusion of the testimony, special issues were submitted to the jury. These questions were preceded by several definitions of terms used in the issues, including (1) "preponderance of the evidence," defined to mean "the greater weight and degree of credible testimony before you," (2) "ordinary care," defined to mean "that degree of care that would be exercised by a person of ordinary prudence under the same or similar circumstances," (3) "negligence," defined to mean "a failure to exercise ordinary care," and (4) "proximate cause," defined to mean "that cause which in its natural and continuous sequence, unbroken by any new and independent cause, produces a result that would not have occurred but for such cause, and which said result or some like result ought reasonably to have been foreseen or anticipated by a person of ordinary prudence in the exercise of ordinary care in the light of attending circumstances." R. 573-574.

Twenty-five special issues were framed by Judge Hughes, but some of them required no resolution in light of the jury's answers to certain other issues. The determinations that were thus made by the jury, together with the evidence supporting such determinations, may be summarized as follows, bearing in mind that much of such evidence was disputed:

(1) *The jury found, from a preponderance of the evidence, "that Helene Curtis New Blue Bleach or L'Oreal Cream Developer contained ingredients that were not suitable and reasonably fit to be used for the purpose for which said products were used when used in combination with each other."* R. 575.

The petitioners did produce competent testimony to justify that jury finding. Dr. Majors, the family physician, testified that his examination of the injury led him to believe "that this chemical burn was produced by the application of the bleaching substance she told me she used on her scalp." R. 100. He further stated that "possibly one of two things happened. One—is that there was some mislabeling of one

of the two bottles so that the solution or the powder was not what was usually in these powders or solutions or that the directions were not followed properly." R. 119.

Moreover, Mr. Emil Dieter, a chemist for Helene Curtis, agreed that "to produce a burn such as this would mean that this product was either improperly manufactured or improperly mixed." R. 280, 295. And Mr. B. B. Anderson, an analytical and consulting chemist who tested both products in question, testified that the primary reaction from the mixture of the products was "the liberation of the oxygen from the hydrogen peroxide, which is your bleaching ingredient or your main active ingredient." R. 415. He further testified, in answer to a question as to whether the chemical applied to the wife's hair would have had to be of a different strength than present in the test samples to produce a burn of the size and magnitude here involved, that the chemical would have "had to be much stronger than what we analyzed." R. 426. Or, as he later stated, the cause of the burn had to be "an increase in the strength [of the peroxides] of one we found [in the test samples]." R. 437.

(2) *The jury found, from a preponderance of the evidence, that the aforementioned ingredients "were a proximate cause of the injury" to the petitioner wife.* R. 575.

The preceding testimony that the wife's chemical burn could have been caused by the application of the products in question and that such a burn would have had to be due to an increase in the strength of hydrogen peroxide over what is normally present in the products justified the finding that the ingredients of the mixture were a proximate cause of the injury.

Moreover, by finding that these ingredients were a "proximate cause" of the injury, the jury was necessarily finding, as the instructions permitted, that such cause was one that produced a result that "ought reasonably to have been foreseen or anticipated by a person of ordinary prudence in the exercise of ordinary care in the light of attending circum-

stances". R. 574. Clearly it was rational to infer that injury to the user ought reasonably to have been foreseen in the exercise of ordinary care from an improper and excessive amount of hydrogen peroxide contained in one or both products.

(3) *The jury found, from a preponderance of the evidence, that both products "had such ingredients" as described in the preceding two special findings.* R. 576.

While the hydrogen perodixe was to be found only in the L'Oreal Creme Developer, both products were clothed in trade secrets and the precise composition of each was unknown to the jury. Nevertheless, there was evidence, heretofore detailed, that the combined products produced the burn and it was reasonable to conclude that the excessive amount of hydrogen peroxide in combination with the other known and unknown components of the products constituted unsuitable and unfit ingredients.

(4) *The jury found, from a preponderance of the evidence, that both Helene Curtis Industries and Cosmair, Inc. "failed to give proper warning of the use of said products to prospective users" but that such failure was not "a proximate cause of the injury of Marjorie Ann Pruitt."* R. 576-577.

This finding was favorable to the respondent corporations but does not detract from the decisive impact of the findings as to their liability on grounds other than the improper warnings.

(5) *The jury found, from a preponderance of the evidence, that both products "contained substances which were corrosive"—a term defined by the instructions to mean "any substance which in contact with living tissue will cause destruction of tissue by chemical action."* R. 577, 578.

Hydrogen peroxide, of course, is a well-known corrosive substance that can cause destruction of human tissue when present in excessive amounts. The L'Oreal product concededly contained hydrogen peroxide and the jury could rationally conclude that when both products were mixed together as directed they contained "corrosive" substances.

(6) *The jury found, from a preponderance of the evidence, that "such corrosive substance. . .was a proximate cause of the injury of Marjorie Ann Pruitt."* R. 578.

The evidence detailed in support of special findings (1) and (2) above equally supports this finding by the jury.

(7) *The jury found, from a preponderance of the evidence, that neither manufacturer "failed to properly inspect and test the manufacture" of the respective products.* R. 578, 579.

This finding, favorable to the respondents, related only to the periodic sample testings at the factories and does not preclude the possibility that one batch or one bottle of the products may have contained an undetected and improper amount of a corrosive or unfit substance.

(8) *The jury found, from a preponderance of the evidence, that the wife was not negligent in mixing the two products, that she did not fail to follow the instructions for use of the two products, and that Mrs. Hendren did not apply the products to the hair in a negligent manner.* R. 580-582.

The testimony of the wife and Mrs. Hendren was clear and uncontradicted to the effect that they both carefully read and followed the instructions for mixing and applying the products in question. R. 29, 162-163. While there was some evidence that the trade secrets made it impossible to ascertain the compatability of the two products and that the use together of these two products could not be recommended by the respondents' experts, the jury was entitled to believe the testimony that the L'Oreal product qualified as a 20-volume peroxide (R. 417-418) that could be used in conjunction with the Helene Curtis product, especially since the L'Oreal bottle described itself as usable "exactly as you would use twenty-volume peroxide."

This justified finding of the jury was critically significant in the ultimate finding of liability since it excluded the possible alternative causes of the injury. The expert testimony was clear that the severe chemical burn could have been

caused only by an improper mixture at the factory or by an improper combining of the products at the time of use, contrary to directions. R. 119, 280, 295. And there was further evidence that even a bobby pin or a cut on the head (neither of which was present here) could not have increased the activity of the products enough to cause this burn. R. 423, 427. Thus, by finding that the instructions were followed, and by excluding all other possibilities, the jury could properly find that the sole cause of the injury was a manufacturing fault by the respondents.

(9) *The jury found, from a preponderance of the evidence, that "the occurrence in question was not an unavoidable accident"—i.e., an accident that happened without negligence on some one's part.* R. 583.

From the specified evidence, the jury plainly could conclude that but for the respondents' negligence in preparing the products that were actually used the accident would not have happened. The evidence was clear that the products ordinarily do not cause burns when properly prepared at the factories and when used according to directions. The conclusion that negligence on some one's part caused the injury is thus inescapable. And, having determined that there was no negligence on the part of the wife or Mrs. Hendren, the jury was entitled to find that the negligence lay with the respondents.

(10) *The jury found, from a preponderance of the evidence, that the recoverable damages to the wife and her husband resulting from this injury amounted to $62,950, plus $1,600 in hospital and doctor bills.* R. 583-585.

Pursuant to this finding, judgment in the amount of $64,550 against the respondents Helene Curtis Industries, Inc., and Cosmair, Inc., "jointly and severally", was entered on November 27, 1964. Interest on that amount at the rate of 6% from the date of entry of judgment to the date of satisfaction of the judgment was also decreed. R. 605.

On appeal, the Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and ordered that judgment be rendered in favor of the respondent corporations.

REASONS FOR GRANTING THE WRIT

The 41-page opinion of the Fifth Circuit seeks to recast the traditional relationship between appellate review power and the fact-finding and inference-making function of federal juries in diversity cases. And that opinion also attempts to extend the established boundaries of a federal court's duty under *Erie R. Co. v. Tompkins,* 304 U.S. 64, to expound and apply state substantive law in diversity situations.

Left unreviewed and uncorrected, the decision below will stand as precedent for the following three propositions: (1) a federal appellate court is free to substitute for the jury's supportable inferences those which the court itself feels to be more "rational", (2) a federal appellate court is free to create and apply as the controlling state law of strict product liability those principles of liability that the federal appellate court would like to adopt for itself, and (3) a violation of the Federal Food, Drug, and Cosmetic Act does not constitute negligence per se.

Such propositions are both dubious and ill-advised. They squarely conflict with the applicable principles established by other courts. And they have been combined by the court below so as to deprive the petitioners of their Seventh Amendment right to the benefits of a jury trial. In these circumstances, and for the reasons more fully developed below, the grant of certiorari to review the judgment below becomes most compelling.

1. The decision below is in conflict with the rulings of this Court as to the reviewability of the evidence supporting a jury verdict.

The Fifth Circuit, as a premise to its ruling, made it plain that it was adopting and applying a federal test as to the nature and quantum of proof necessary to establish strict liability under the applicable Oklahoma law.[4] As it had done in its earlier ruling in *Planters Mfg. Co. v. Protection Mutual Ins. Co.*, 380 F.2d 869,[5] the Fifth Circuit here announced, at pages 9-10 of its opinion, that "the sufficiency of the evidence is a matter of federal law" and that

> "The test employed by the Fifth Circuit is that a fact issue must be submitted to the jury if reasonable men could differ on the conclusions to be reached from the evidence presented. . . . We must view the evidence and all reasonable inferences most favorably to the party against whom the motion is

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[4] At page 4 of its opinion, the Fifth Circuit noted that a federal court sitting in Texas should apply the substantive law of the state in which it sits and that such substantive law includes the conflicts-of-law rules. Since Texas in conflicts situations applies the *lex loci delictus* rule and since the injury here occurred in Oklahoma, the Fifth Circuit ruled that Oklahoma substantive law is controlling. It was also noted that both Oklahoma and Texas have adopted the theory of strict liability in tort.

[5] This Court denied certiorari but a few months ago in the *Planters* case. 389 U.S. 930; No. 529, Oct. Term 1967. The Fifth Circuit in *Planters* had noted that this Court "has yet to settle the conflict which exists among the courts of appeals" as to whether federal or state law governs the determination of the sufficiency of the evidence to raise a question of fact for the jury in diversity cases. 380 F.2d at 870. In formulating a federal rule, the Fifth Circuit in *Planters* adopted the concepts of sufficiency of evidence to support a jury verdict developed by this Court in Federal Employer Liability Act cases, especially *Lavender v. Kurn*, 327 U.S. 645.

> made. Moreover, only the evidence and the reasonable inferences which support. . .[petitioners'] theory may be considered. . . . Indeed, after *Planters* our sole function is to ascertain if there is a *rational basis in the record* for the jury's verdict." [Emphasis in opinion.]

Petitioners have no quarrel with the Fifth Circuit's adoption of a liberal federal rule as to the sufficiency of the evidence, a rule that the Fifth Circuit has made plain is taken *in toto* from the rule employed in *Lavender v. Kurn*, 327 U.S. 645, and in other F.E.L.A. decisions of this Court. But they do quarrel with any formulation of a rule that in terms or in practice permits an appellate court, in determining whether there is a "rational basis in the record for the jury's verdict," to substitute its view for that of the jury's as to what evidence, what inferences and what result is rational. Significantly, the F.E.L.A. rule developed by this Court and purportedly adopted here by the Fifth Circuit speaks not in terms of searching for a "rational" basis in the record but for an "evidentiary" basis to sustain the jury's verdict. *Lavender v. Kurn, supra*, 653; *Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 700. And the prime purpose behind this Court's emphasis on what is "evidentiary" is to preclude judicial speculation as to what is more rational or reasonable than what the jury found.

Yet this proscribed post-trial speculation about what is more rational appears to be the hallmark of the Fifth Circuit's so-called federal rule, first announced innocently enough in *Planters* to sustain a jury verdict and now put to the real purpose of upsetting what the court deems to be an irrational jury verdict. The opinion below summarizes at some length (Opinion, App. pp. 12-15, *infra*) the petitioners' evidence that (1) the chemical burn had to be due either to a defect in the manufacture of the ingredients or to a failure to mix the products in accordance with directions, (2) the products were in this instance properly mixed by the two women in strict accord with the directions, and (3) there were no abnormal conditions or foreign particles in the wife's hair.

But instead of directing its attention to whether such testimony constituted "an evidentiary basis for the jury's verdict," *Lavender v. Kurn, supra,* 653, the Fifth Circuit in execution of its new federal rule engaged in the following speculations about what the court—not the jury—deemed to be rational or irrational:

(a) The Fifth Circuit disposed of the foregoing evidence with the remark that "we believe that in this instance a finding of a defect was unwarranted," particularly since it is "a matter of common knowledge that cosmetics can never be made completely safe for all users and can cause injuries for many reasons other than a defect in the product." Opinion, App. pp. 15, 17-18, *infra.*

(b) The Fifth Circuit stated its view, despite the evidence that no possible factors other than improper manufacture could have caused the burn, that the petitioners "failed to prove that it was the toxicity of the products which caused the injury rather than the other factors just enumerated [contact with other products, the method of application, or an allergic condition]." Opinion, App. p. 2, *infra.*

(c) The Fifth Circuit termed the evidence that the products were either defective or misapplied as "equivocal" and doing "nothing to exclude each other," without bothering to determine if the jury could legitimately conclude from the evidence of proper application and the exclusion of other possible causes of the burn that the products must have been defective. Opinion, App. p. 19, *infra.*

(d) The Fifth Circuit, in disregard of what the jury could legitimately conclude from the conflicting testimony, stated its own view that the petitioners did not show "that the mixture of these products was intended," particularly since the directions on each package "suggest that the mixture was not intended." Opinion, App. p. 20, *infra.* Thereby ignored was the evidence before the jury that the L'Oreal product was a 20-volume hydrogen peroxide mixture that could be joined and was in fact properly joined with the Helene Curtis product as directed. And by ignoring that

evidence, the court was able to say that there was no "rational basis in the record from which the jury can make a selective choice" as between a defective product and a mixture contrary to directions. Opinion, App. p. 22, *infra*.

(e) Again without making any inquiry into the permissibility of the jury's conclusion on the subject, the Fifth Circuit announced flatly that the respondent manufacturers cannot "be said" to have foreseen this mixture "since the trade secrets of one maker prevented any safety tests on the product of the other." And in disregard of the jury instructions and consequent findings of foreseeability of harm from from improperly made products, the Fifth Circuit proclaimed as *ispe dixit* that the mixing of these products "amounted to an abnormal handling or substantial alteration which, because it was unintended and unforeseen, excuses the makers from responsibility for any harm." Opinion, App. p. 23, *infra*.

(f) The Fifth Circuit overtly searched the record for evidence which it felt made Mrs. Hendren's methods of application "the conduct of an atypical user and render the finding of a defect in the products irrational." Opinion, App. p. 27, *infra*. Thus the court, in rendering the jury verdict "irrational" in this respect, looked not to the evidence which might have supported that verdict but to other evidence of a contradictory nature from which an opposite verdict might have been drawn—i.e., evidence that the words "for professional use only" on the products could be interpreted to mean use by professional beauticians only and that a professional beautician would have taken even greater care than specified in the written directions or than taken by Mrs. Hendren to guard against leaving the solution on the hair too long. Such additional precautions, *in the court's view*, would have lessened the chances of injury and served to nullify the statements that the products were either defective or misapplied. Opinion, App. p. 26, *infra*.

In thus labelling as "irrational" the jury's contrary verdict, the court below made not the slightest effort to test

the evidentiary support in the form of testimony that, whatever the language on the products and whatever other steps were taken to insure sale to professional beauticians only, non-professionals like Mrs. Hendren obviously could and did purchase the products with ease. Did not that fact alone justify an inference by the jury that Mrs. Hendren and the petitioner wife were among the foreseeable and thus intended users and that whatever additional precautionary steps might be deemed necessary should have been spelled out in the instructions?[6]

(g) Finally, the Fifth Circuit made its own speculation that the injury may have been due to an allergic reaction to the particular mixture here involved, a possibility that should have been explored through a patch test (not mentioned or recommended in the directions) that a professional "would have performed." Opinion, App. p. 28, *infra.* The uncontradicted evidence before the jury that the wife's hair and skin were normal in all respects and that she had no known allergies was dismissed as meaningless since, in the court's view, "none of her evidence was connected to the prior use of these products." And any presumption that her skin was normal was said to be "contrary to common sense"—a judicial evaluation allegedly "reinforced" by the Fifth Circuit's own finding of fact "that the products were mixed contrary to directions and applied by a novice." *Ibid.*

A more complete reversion to a *de novo* and subjective review of a trial record by an appellate court would be difficult to imagine. Despite all its protestations to the con-

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[6] The Helene Curtis directions, set forth in the Opinion, App. p. 13, *infra,* are written in simple language more appropriate for public than professional consumption. The jury could appropriately find, as it did (R. 576), that these instructions, to the extent that they failed to warn of the need for a patch test, "failed to give proper warning of the use of said products to prospective users."

trary, the Fifth Circuit has gone far beyond the limits of searching for and testing the evidentiary basis in the record for the jury's verdict. It has made its own intensive quest for other evidence to support a completely contrary verdict; it has made its own subjective evaluations and inferences as to whether the directions were followed, whether the products were meant to be mixed and whether the wife was an "intended user"; it has taken unto itself the jury's task to determining causation and foreseeability of harm; and instead of testing the adequacy of the evidence that could support the jury's verdict, the Fifth Circuit merely applied the epithet "irrational" to such evidence.

Thus the Fifth Circuit's concept of the federal test for evaluating the propriety of a jury's verdict, particularly as applied in this instance, is a complete negation of all the principles heretofore established by this Court—principles which the Fifth Circuit purported to use in formulating its federal test. Time and again this Court has warned that "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury." *Lavender v. Kurn*, 327 U.S. at 652-653. And where, from the record, "there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search [by an appellate court] for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364. Thus, having found no error in the instructions, the Fifth Circuit should have affirmed the jury's verdict. See *Parks v. Simpson Timber Co.*, 388 U.S. 459.

Because, in diversity cases like the instant one, it is the Seventh Amendment that fashions "the federal policy favoring jury decisions of disputed fact questions," *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525 at 538, the grant of cer-

tiorari becomes appropriate to consider the constitutional propriety of the Fifth Circuit's standard for review of jury verdicts, as applied in this case.

2. The decision below raises important problems as to a federal court's function in determining and applying state law in a diversity case.

The alternative basis of the judgment below is to be found in the last 13 pages of the opinion, containing a ruling that as a matter of law the doctrine of strict liability forecloses any recovery in this case. Opinion, App. pp. 29-41, *infra.* Presumably and necessarily, that ruling was meant to be reflective of the Oklahoma law of strict liability, the court having remarked some 24 pages earlier that "Hopefully, our '*Erie* prediction' will be indicative of what Oklahoma will do in the future and will not be easily erased." Opinion, App. p. 5, *infra.*

Preliminarily, it should be noted that since Oklahoma is in the Tenth Circuit the judges of the Fifth Circuit are not presumed to be "familiar with the intricacies and trends of local [Oklahoma] law and practice." *Huddleston v. Dwyer,* 322 U.S. 232, 237; *General Box Co. v. United States,* 351 U.S. 159, 165. Their evaluation and prediction as to the Oklahoma law of strict product liability are thus not entitled to the weight otherwise accorded by this Court to such pronouncements by federal judges as to the law of a state within their Circuit.

But, more importantly, the Fifth Circuit's decision raises several serious questions whether the *Erie* function of discovering and applying the applicable Oklahoma law was properly performed here:

(a) *Did the Fifth Circuit even attempt to discover or apply the Oklahoma law of strict liability?* Apart from a "cf." reference to the Oklahoma Supreme Court decision in *Marathon Battery Co. v. Kilpatrick,* 418 P.2d 900, the entire 13-page dissertation by the Fifth Circuit of the law of strict liability contains not one reference to or discussion of Okla-

homa law, or the techniques used by Oklahoma courts to fashion developments or extensions of that law. See Opinion, App. pp. 29-41, esp. p. 39, *infra*. At the same time, the Fifth Circuit acknowledged earlier in its opinion that the *Marathon* decision, while its basis was said not to be clear, justified "the conclusion that Oklahoma will also adopt the theory of strict liability in tort." Opinion, App. p. 4, *infra*.

Actually, had the Fifth Circuit given heed to the *Marathon* decision instead of concentrating on a wide assortment of law review articles and decisions from other state courts a highly relevant delineation of the Oklahoma law of strict liability would have become apparent. That decision, rendered in 1966, involved the liability of a manufacturer of a battery that had exploded while in the hands of a user-purchaser. The Oklahoma court there ruled, in language fully applicable to the instant case, that:

> "Neither are we required to consider defendants' argument that the evidence failed to show negligence in manufacture, defective conditions when sold, that harm could result when used as intended, or that such alleged negligence or defect was the proximate cause of the injury. It is an accepted rule that proof of negligence is unnecessary to establish liability for breach of warranty." 418 P.2d at 911.
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> "The primary issue involved was whether the battery exploded, and the matter was explicitly submitted to and determined by the jury. We have held consistently that in civil cases the facts are provable by direct or circumstantial evidence, or by both. And it is not required that the proof rise to that degree of certainty which will support only one conclusion to the exclusion of others." 418 P.2d at 917.
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> "The defense was that the battery could not explode, therefore the explosion which occurred resulted from outside agency or force. It is settled law that the weight to be given to expert testimony

is for the jury, who may follow their own experience, observations and common knowledge and reject the opinions of experts." 418 P.2d at 914.

"We . . . hold the manufacturer's liability was established when it was shown that plaintiff was injured while using the battery for the purpose intended by reason of a defect as to which he was not aware, and could not have ascertained by examination." 418 P.2d at 915.

It is thus apparent that the Oklahoma law of strict liability greatly reduces the degree of proof necessary to establish fault on the part of the manufacturer of a product and heavily relies upon the good sense of juries to make the necessary findings and inferences. Indeed, with respect to the proof necessary to establish strict liability, the Oklahoma rule appears to be no different than that followed by most other states. And as one authoritative commentator has recently observed,[7] "it seems quite apparent that there is nothing in any of the strict liability cases to indicate that the problems of proof will be dealt with in any different manner than in those involving only negligence." Even as to such concepts as that of "intended use," discussed at great length by the court below, it is generally recognized that this notion "is but a convenient adaptation of the basic test of 'reasonable foreseeability' framed to more specifically fit the factual situations out of which arise questions of a manufacturer's liability for negligence." *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83 (C.A. 4). See also *Parks v. Simpson Timber Co.*, 388 U.S. 459; *Albanese v. N. V. Nederl. Amerik Stoomv. Maats.*, 382 U.S. 283. As to all such matters, the Oklahoma law is not unique in making the jury the prime arbiter of factual disputes and inferences.[8] Given

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[7]Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791, 848 (1966).

[8]In *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 525-526, this Court stated: "The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that neg-

proper jury instructions and supportable findings on these issues, an appellate court is not free under either Oklahoma or federal law to disregard the jury verdict. See *Parks v. Simpson Timber Co., supra.*

The Fifth Circuit's complete failure to appreciate or apply the Oklahoma law of strict liability, as enunciated in the *Marathon* decision, suggests that it "has so far departed from the accepted and usual course of judicial proceedings" in this *Erie*-type situation "as to call for an exercise of this Court's power of supervision." Rule 19 of this Court's Rules.

(b) *Did the Fifth Circuit, instead of applying Oklahoma law, attempt to create a rule of strict liability in accord with its own views as to desirable policies and results?* In an *Erie* situation, a federal court must attempt to discover and apply state substantive law, even though it be difficult to ascertain precisely what the state law provides. See *Meredith v. City of Winter Haven,* 320 U.S. 228, 234-235. But the federal court "must keep in mind . . . that its function is not to choose the rule which it would adopt for itself, if free to do so, but to choose the rule which it believes the state court, from all that is known about its methods of reaching decisions, is likely in the future to adopt." Wright, *Federal Courts,* § 59, p. 206 (1963).

Yet the Fifth Circuit appears here to have enunciated at great length its own feelings and policies regarding strict liability without so much as a nod in the direction of Okla-

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ligence consists of doing that which a person of reasonable prudence would have done under the circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' "

homa's possible feelings and policies in this respect. Marshalling a host of court decisions from other states, law review articles and the Fifth Circuit's own views of the evidence in this case, the opinion below is replete with such broad policy statements as:

(1) The respondent corporations "were not required to give directions which would allow Mrs. Pruitt to use the products safely. Indeed, they could confine their products to beauty shops, and incur liability only if a consumer were injured when the solutions were applied there." Opinion, p. 33.

(2) "*Harper* [a New York decision] and *Kaspirowitz* [a New Jersey decision] suggest that a warning to the beauty shop terminated the makers' responsibility for the future sale of the product . . . . These words [on respondents' products] were sufficient, in light of the beautician's training and status as an expert, to apprise any beautician that the products were not for amateurs and thus not for resale. Therefore, the resale by the beauty shop amounted to an intervening cause which severed the causal chain and insulated Appellants from liability for any subsequent harm." Opinion, pp. 35-36.

(3) "That doctrine [of foreseeability of harm] is a judicial explanation of the social policies which limit liability. . . . Once fault is removed as a limitation on liability, these policy considerations should be candidly explained. Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head-on collision between the need for adequate recovery and viable enterprises." Opinion, p. 37.

(4) "In this type of market, it would be impossible to police the prohibited reselling by trade agreements. Nor can the single sale by a beauty shop in Terrell, Oklahoma be indicative of such widespread practice in the industry that we can hold that the makers knew or should have known of the practice and should have taken additional precautionary steps." Opinion, p. 38.

(5) "Therefore, although consumers' expectations are relevant, the expectations frustrated in this case are not the one which have been the impetus behind the imposition of strict liability. Alternative ways existed for Mrs. Pruitt to satisfy her desire to be a blonde. . . . She could have simply gone to a qualified beautician." Opinion, pp. 39-40.

(6) "The paramount reasons for denial of recovery in this case are the principles which have been traditionally employed to invoke the doctrine of strict liability. These policies compel our holding that the imposition of strict liability on these Appellants simply because they are the best-risk-bearers would be an undue impediment to business and an intolerable injustice. The policy that the maker has the greatest capacity to distribute the risks of loss is not such a blanket rule that it applies even though justice demands that another member of the marketing chain take the risk of loss for the injury." Opinion, p. 40.

Some of the foregoing remarks might be relevant in a petition to the Oklahoma legislature to limit the doctrine of strict liability by statute, or even perhaps in a brief filed in the Oklahoma Supreme Court. But it is impossible to say that such statements and assertions in any way reflect the present Oklahoma law respecting the policies or the limits of the doctrine of strict liability. They can only be classed as an expression of what the Fifth Circuit thinks the doctrine should be were that court free to enunciate a federal strict liability rule of its own. And even that expression is impregnated with the court's own subjective views as to what inferences might be drawn from the evidence, as distinguished from those legitimately drawn by the jury.

In thus exceeding its function under the *Erie* doctrine by formulating its own policies of substantive law, the Fifth Circuit has again "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 19 of this Court's Rules.

3. The decision below raises important problems under § 361 of the Federal Food, Drug, and Cosmetic Act.

The Fifth Circuit, in footnote 1 of its opinion (see App. p. 3, *infra*), has plainly misinterpreted the language of § 361. In holding that this section of the Act was not violated in this case, the court referred to § 361 as defining an "adulterated" cosmetic as one that causes harm "under conditions of use which are prescribed by the directions *and* must be used in the customary and usual fashion." [Emphasis added.]

Section 361 obviously reads in the alternative, not the conjunctive. A cosmetic is adulterated if it contains deleterious substances rendering it injurious to users "under the conditions of use prescribed in the labeling thereof, *or* under such conditions of use as are customary or usual." [Emphasis added.]

Thus if, as the jury here found, the use of the adulterated products not only caused harm but was in accordance with that "prescribed in the labeling," a violation of the Act would be established, quite apart from whether the conditions of use might be termed "customary or usual." The plain misreading of § 361 by the Fifth Circuit calls for review and correction.

Moreover, once such a violation of the Act has been shown, an important question is raised as to whether that violation constitutes negligence per se, eliminating the need either as a matter of federal law or under the applicable Oklahoma law for proof of the elements of due care and foreseeability—concepts that so deeply concerned the Fifth Circuit in this case. Indeed, the Fifth Circuit's refusal to so read the implications of a statutory violation and to apply those implications to this case directly conflicts with the Fourth Circuit's rulings in *Orthopedic Equipment Co. v. Eutsler*, 276 F.2d 455, 462, and *Gober v. Revlon, Inc.*, 317 F.2d 47, 51. In both these cases, the Fourth Circuit recognized that a violation of this Act constitutes negligence per se, making it unnecessary "to explain to the jury the elements

of due care and foreseeability." 276 F.2d at 462. Such a conflict makes it appropriate that this Court exercise its review powers in this instance.

CONCLUSION

For these various reasons, the writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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